

No. 11,657

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STORK RESTAURANT, INC. (a corporation),
Appellant,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SAHATI,
EDMOND SAHATI, ALFRED ANSARA, A. E.
SYUFY,
Appellees.

BRIEF FOR APPELLEES.

ALBERT PICARD,

Financial Center Building, San Francisco,

Attorney for Appellees.

ALFRED E. GRAZIANI,

Financial Center Building, San Francisco,

Of Counsel.

FILED

OCT. 3 1947

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Facts	1
I.	
Appellant has failed to show that appellees are guilty of unfair competition or any competition with appellant.....	2
II.	
Appellant is not entitled to an injunction upon the theory that it has been damaged in a property right.....	5
III.	
Cases in the Ninth Circuit have decided the same points herein involved in favor of appellees	7
Conclusion	10

Table of Authorities Cited

	Pages
Brass Rail, Inc. v. The Brass Rail of Massachusetts, Inc., 43 F. Supp. 671	3
Brooks Bros. v. Brooks Clothing of California, Ltd., 158 F. (2d) 798	7, 8
Lerner Stores Corporation v. Lerner, 162 F. (2d) 160.....	7, 9
Southern California Enterprise, Inc. v. Broadway Ballroom, Inc., 64 N.Y.S. (2d) 613.....	5
The Brass Rail, Inc. v. Brass Rail Restaurant Co., U. S. Dist. Ct., West. Dist. of Pa., June 2, 1938, 28 Trade-Mark Reporter 408, 38 Pat. Q. 58.....	4

No. 11,657

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STORK RESTAURANT, INC. (a corporation),
Appellant,

VS.

N. SAHATI, ZAFER SAHATI, SALLY SAHATI,
EDMOND SAHATI, ALFRED ANSARA, A. E.
SYUFY,
Appellees.

BRIEF FOR APPELLEES.

FACTS.

The facts of the instant case as given in the brief for appellant are substantially correct for the purpose of this appeal and appellees respectfully call attention to appellant's statement of the vastness of its operation of the Stork Club in the City of New York in comparison with the smallness of appellees' "Stork Club" in the City and County of San Francisco.

The question in this appeal lies in the use of a trade name, to-wit, "Stork Club", by both parties to the action and in the use of an insignia claimed by the appellant. There is not involved in this appeal any question of a registered trade mark.

Appellees have no quarrel with the general rules relative to trade names and trade insignia used in business and as set forth in the cases cited by appellant. However, appellees rest their entire argument upon the particular facts of the case before this Court.

I.

APPELLANT HAS FAILED TO SHOW THAT APPELLEES ARE GUILTY OF UNFAIR COMPETITION OR ANY COMPETITION WITH APPELLANT.

From all the evidence in this case and from the statements set forth in appellant's brief it is clearly shown that appellant operates a night club and cafe that is very extensive in its operation; that appellees operate a small bar some 3000 miles away from appellant's place of business; that appellant employs some 240 employees in the operation of its business; that appellees employ 4 employees; that appellant operates a night club catering to world celebrities from political, social and entertainment fields and sells high price and high quality foods, beverages and entertainment; that appellees have just an ordinary bar and restaurant serving a minimum of food to meet the requirements of the Liquor Control Authorities of the State of California.

From the very facts as adduced from the evidence and as succinctly restated in appellant's brief the two places are at extreme poles from each other. The

appellant's place is of the highest, and the appellees', to say the least, is very modest in its operation.

Can it be truthfully stated from the evidence presented that appellees are in "unfair competition" or in any competition whatsoever with appellant? Appellant has failed to show by any of its evidence that by appellees' operation appellant has lost custom or prestige so that appellees' operation in any way has injured appellant. Some showing has been made that appellant draws customers from certain residents of San Francisco and of the vicinity of San Francisco. However, there was no evidence that by reason of appellees' operation of a "Stork Club" in San Francisco those customers of appellant in this vicinity were fooled or misled into belief that the establishment here had any connection in any way with the world famous Stork Club of New York City.

Appellant cited *Brass Rail, Inc. v. The Brass Rail of Massachusetts, Inc.*, 43 F. Supp. 671, in which case the Court held that the plaintiff, of New York City, could enjoin the defendant in Boston from using the name "Brass Rail". An examination of this case shows that defendant copied plaintiff's exact method of operation, and did so with an absolute intention of obtaining the benefits of the reputation of plaintiff. The distinguishing fact in that case was "the striking similarity of the physical set up of defendant's places of business and that of the plaintiff", which lead the Court to conclude that the defendant sought to imitate the plaintiff in all respects. It is

respectfully submitted that the facts in the instant case are entirely different, if for no other reason than from the purely physical status and operation of the two places of business herein involved.

It is also interesting to note that in another *Brass Rail* case involving apparently the same Brass Rail as the plaintiff in the case quoted above, the Court held that the defendant in that case was not in unfair competition with the plaintiff even though the names were the same. The facts in the last case show that plaintiff occupied a four story building with large dining rooms and an investment of some \$750,000.00 and employed approximately 275 persons serving customers with expensive foods cooked on the premises. Defendant opened a 5 and 10 cent sandwich and soft drink restaurant in Pittsburgh which grew as time went on until at the time of the suit defendant owned 10 such restaurants. The Court held "There is no evidence from which we can find that defendant adopted the name with the view to injuring the business of the plaintiff and to take advantage of the reputation of the plaintiff's restaurant." (*The Brass Rail, Inc. v. Brass Rail Restaurant Co.*, U. S. Dist. Court, West. Dist. of Pa. June 2, 1938, 28 Trade-Mark Reporter 408, 38 Pat. Q. 58.)

Likewise in this case appellant has not shown that appellees adopted the name Stork Club with the intention of trading upon or obtaining the advantages of the reputation of appellant's restaurant or in any way to forestall the extension of appellant's trade

or for any other purpose. In fact the evidence showed that appellees purchased the said business sometime after it had been known and called by the previous owners the "Stork Club."

Southern California Enterprise, Inc. v. Broadway Ballroom, Inc., 64 N. Y. S. (2d) 613, is a case involving the use by the defendant in New York City of the word "Palladium" for a dance hall. Plaintiff had previously adopted said name for its huge ballroom large enough to accommodate 9,000 persons in Hollywood, California, and sought to restrain defendant from using the same name for its dance hall in New York. The Court refused to grant such an injunction on the ground that the two establishments were entirely different even though they were both ballrooms. The Court stated that plaintiff maintained a magnificent establishment whereas defendant's ballroom was an unpretentious dance hall. The same analysis and distinguishment can be made between the appellant Stork Club and the appellee Stork Club.

II.

APPELLANT IS NOT ENTITLED TO AN INJUNCTION UPON THE THEORY THAT IT HAS BEEN DAMAGED IN A PROPERTY RIGHT.

It must be remembered that this case is one involving a trade name and not a trade mark duly registered. While it is true that there is some evidence that appellees used the depiction of a stork on the carpet in

its entrance and a stork on the napkins and a stork upon the juke box, none of these storks were similar or identical to the stork claimed by the appellant. It must also be remembered that the alleged trade name in and of itself "Stork Club" means nothing unless appellant can show that that name has become synonymous with its particular business and that it is so well known that the use by any one else would deprive appellant of its business or custom or injure appellant in some way.

The evidence clearly shows that appellant operates its business solely in New York City and in no other locality in the United States and that it has no intention of opening any branches in any other part of the United States.

How, then, has appellant been injured by the use of the name "Stork Club" by appellees?

Appellant is not a merchant in the true sense as it does not sell any product but merely sells services in its restaurant together with entertainment. Appellant does not have a product which is sold in interstate commerce or in any commerce whatsoever, but in contrast, to purchase what appellant has for sale the prospective purchaser must travel to the City of New York in order to become a customer of appellant. It may be true that appellant has customers and a clientele from the City and County of San Francisco and from the vicinity of said City and County of San Francisco. However, said customers must travel 3,000 miles in order to enjoy the fruits of their purchases from appellant.

Appellant has stated that the use of the alleged trade name by the appellees will cause irreparable damage to appellant but has failed to introduce any evidence whatsoever to show such irreparable damage. The cases cited by appellant under this heading are all cases involving the actual sale and transfer of some product or products manufactured and sold by the parties to those suits and some of said cases involve the use by the defendants of trade marks registered by the plaintiffs. Neither of these two situations appears in the instant case and it is respectfully submitted that appellant has failed in any way to show any irreparable damage by appellees' use of said name.

III.

CASES IN THE NINTH CIRCUIT HAVE DECIDED THE SAME POINTS HEREIN INVOLVED IN FAVOR OF APPELLEES.

Appellant has cited innumerable cases, all of which can easily be distinguished from the facts in the instant case. Appellees feel that it is not necessary to distinguish each case cited by appellant in view of the recent consideration by the Court of such cases in this jurisdiction as *Brooks Bros. v. Brooks Clothing of California, Ltd.*, 158 F. (2d) 798, and *Lerner Stores Corporation v. Lerner*, 162 F. (2d) 160, in which cases this Court has reviewed and distinguished most of the cases cited by appellant in its opening brief. However, it can be said that most of the cases cited by appellant involve unauthorized use of duly and properly registered trade marks, or the unfair competition

of the defendants in the same locality served by the plaintiffs, or the competition of the defendants with a product similar to that of the plaintiffs coupled with a confusingly similar trade name or trade mark, which trade name and trade mark were adopted in order to obtain the benefits of the reputation of the name of the plaintiff.

In the instant case it can be said that the cases cited by appellant do not apply because of the difference in facts and the peculiar difference of the two businesses herein involved, to-wit:

1. Appellant operates a large establishment and appellees a very small one.
2. Appellant does not do business in the City and County of San Francisco in any manner or form.
3. Appellees do not in any way compete with appellant.
4. Neither party sells or manufactures goods in commerce.
5. The great distance between the two places of business.

In *Brooks Bros. v. Brooks Clothing of California, Ltd.*, supra, the Court reviewed the humble beginnings of the defendant and the original operation of defendant's business as a small, low-priced clothing business, and then went on to say "and had the defendant remained in the humble field in which it began and had it used its full partnership or corporate name its innocent adoption might, perhaps, call for denial of relief for unfair competition."

Here it can be truthfully stated that appellees, in comparison to appellant, are in a most humble field of operation. Their establishment is small in comparison to that of appellant; its volume of business is minute in comparison to appellant's; it employs 4 workers in comparison to appellant's 240. Being humble in comparison to appellant this Court can very well deny any relief for unfair competition with appellant.

Lerner Stores Corporation v. Lerner, supra, involves a set of facts very similar to those in the instant case and in that case relief was denied to the plaintiff. The facts in the *Lerner* case disclose that plaintiff operates a store in San Francisco which draws some trade from customers in San Jose and that defendant operates a store in San Jose under the name of Lerner. It is interesting to note that the distance between San Francisco and San Jose is some 50 miles and that the distance between San Francisco and New York is some 3000 miles. This Court refused to grant an injunction in the *Lerner* case on the ground that no ordinary observant person would confuse defendant's store with the plaintiff's stores even though it could be stated that plaintiff had stores in San Francisco and in Oakland, planned to have a store in San Jose and also in other communities in the Bay Area such as in Palo Alto, San Mateo and Burlingame.

CONCLUSION.

It is respectfully submitted that appellant failed to establish the necessary prerequisites to obtain an injunction, to-wit: appellant has failed to show in any way that the appellees have engaged in a practice which can be construed to be unfair competition, and that appellant was damaged to any extent in their alleged property rights in and to the name Stork Club, and, therefore, appellees respectfully pray that the judgment of the trial Court be affirmed.

Dated, San Francisco,
October 2, 1947.

Respectfully submitted,
ALBERT PICARD,

Attorney for Appellees.

ALFRED E. GRAZIANI,
Of Counsel.